REMARKS

Applicant has reviewed the final Office Action of April 9, 2008. No claims are amended or cancelled. Claims 43-51 are pending. Reconsideration of the application is requested.

Claims 43-51 were rejected under 35 U.S.C. 101 as allegedly claiming the same invention as claims 1-16 and 26-39 of prior U.S. Patent No. 6,749,804.

Claims 43-51 were rejected under 35 U.S.C. 101 as allegedly claiming the same invention as claims 1-12 and 20-30 of U.S. Patent No. 6,616,892.

Applicant traverses the two double patenting rejections together.

Applicant reiterates that the test for double patenting under 35 U.S.C. 101 is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent, or vice versa. MPEP § 804(II)(A). *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970). If the answer is yes, then identical subject matter is not present and double patenting has not occurred.

Please note that the test for double patenting depends entirely on the claim language, not the specification. The Examiner stated that the examples present in the specifications of the '804 and '892 patents are clear evidence that "lowering of the pH to less than 5 is a direct result of applying TCM to an animal habitat that is not distinguishable from the ammonia reducing and odor reducing properties of TCM." Applicant disagrees because lowering the pH is distinguishable from ammonia and odor reduction. In particular, ammonia and odors can be reduced without lowering the pH to less than 5. The examples of the '892 patent provide support for the instant claims (because the instant application claims priority to the '892 patent).

The Examiner's reasoning as to the 101 statutory rejection may be incorrect. A 101 statutory rejection is appropriate if the claimed subject matter is identical to the patented claims. If the claims are not coextensive in scope, then a 101 statutory rejection is improper. See the form paragraphs provided by the Examiner on page 3 of the office action. In other words, the claims of the patent and the application can overlap in scope, as long as they are not identical.

Independent claim 43 does not have the same scope as the cited claims. Independent claim 1 of the '804 patent reads:

> 1. A process for reducing the production of ammonia and odors in an animal habitat containing fecal matter and urine comprising the steps of treating said habitat with an effective amount of trichloromelamine wherein the application of trichloromelamine is at a point in time wherein it can affect the production of ammonia and odors from nitrogen and sulfur bearing compounds as may be present in the habitat, and wherein the concentration of trichloromelamine is from about 100 to about 200 ppm.

As to claim 1, identical subject matter is not present. For example, one can apply an amount of 100-200 ppm TCM solution such that the habitat's pH is lowered to only pH 6. This pH is not less than 5, but the production of ammonia and odors is affected. On this point, Applicant notes that ammonia is very basic, having a pK_b of about 4.75. Thus, claim 1 of the '804 patent may be literally infringed while instant claim 43 is not.

Independent claim 26 of the '804 patent reads:

> 26. A process for sanitizing an animal habitat comprising the steps of treating said habitat with an effective amount of trichloromelamine wherein the application of the trichloromelamine is done in such a manner as to bring the trichloromelamine into contact with a bacteria as may be present in the habitat, and wherein the concentration of trichloromelamine is from about 100 to about 200 ppm.

Again, as to claim 26, identical subject matter is not present. For example, one can apply an amount of 100-200 ppm TCM solution to contact the bacterium, but only lower the pH of the habitat to 6. Contact with a bacterium is made, but the pH is not less than 5, as required by instant claim 43. Thus, claim 26 of the '804 patent may be literally infringed while instant claim 43 is not.

Independent claim 1 of the '892 patent reads:

> 1. A process for reducing the production of ammonia and odors in an animal habitat containing fecal matter and urine comprising the steps of treating said habitat with an effective amount of trichloromelamine wherein the application of trichloromelamine is

> at a point in time wherein it can affect the production of ammonia and odors from nitrogen and sulfur bearing compounds as may be present in the habitat.

As to claim 1, identical subject matter is not present. For example, one can apply TCM such that it affects the production of ammonia and odors, but only lowers the pH of the habitat to 6. Again, this pH is not less than 5, as required by instant claim 43. Thus, claim 1 of the '892 patent may be literally infringed while instant claim 43 is not.

Independent claim 20 of the '892 patent reads:

> 20. A process for sanitizing an animal habitat comprising the steps of treating said habitat with an effective amount of trichloromelamine wherein the application of the trichloromelamine is done in such a manner as to bring the trichloromelamine into contact with a bacteria as may be present in the habitat.

Again, as to claim 20, identical subject matter is not present. One can apply TCM to contact a bacterium but only lower the pH of the habitat to 6. This pH is not less than 5, as required by instant claim 43. Thus, claim 20 of the '892 patent may be literally infringed while instant claim 43 is not.

Applicant submits that the instant claims 43-51 do not recite identical subject matter. Withdrawal of the § 101 rejections based on the '804 and '892 patents is requested.

CONCLUSION

For the reasons detailed above, it is respectfully submitted all claims remaining in the application (Claims 43-51) are now in condition for allowance. Withdrawal of the rejections and issuance of a Notice of Allowance is requested.

In the event the Examiner considers personal contact advantageous to the disposition of this case, he is hereby authorized to call Richard M. Klein, at telephone number 216-861-5582, Cleveland, OH.

It is believed that no fee is due in conjunction with this response. If, however, it is determined that fees are due, authorization is hereby given for deduction of those fees, other than the issue fees, from Deposit Account No. 06-0308.

Respectfully submitted,

FAY SHARPE LLP

June 16, 2008
Date

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	Signature: Lynda S Kalemba
Date: June 16, 2008	Name: Lynda S. Kalemba

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